# Sheikh Khaled bin Jassem bin Mohammad Jassem Al-Thani (t/a Petroserv General Trading Establishment) v Merbok Hilir Bhd (No 1)

HIGH COURT (PULAU PINANG) — CIVIL SUIT NO 22–616 OF 2006
CHEW SOO HO JC
14 MARCH 2012

*Civil Procedure — Amendment — Application to amend title suit and statement of claim — Technical or procedural amendment — Whether amendment necessary — Leave to amend pleadings — Court's discretion*

The plaintiff orally applied to amend the name of the plaintiff in the title of the suit from 'Petroserv General Trading Establishment' to 'Sheikh Khaled Bin Jassem Bin Mohammad E Jassem Al-Thani Berniaga Sebagai Petroserv General Trading Establishment' and to delete the words 'sebuah syarikat yang diperbadankan di Doha, Qatar' and substituting it with 'seorang individu yang berniaga di bawah nama Petroserv General Trading Establishment' in the statement of claim. The amendment was necessary as a firm cannot sue in its own name although it might be sued in such name. The main ground of objection from the defendant was that the amendment, if allowed, would render their appeal against their O 14A application which had been dismissed by the court, nugatory or defeat their appeal based on the pleadings. The defendant contended that the amendment would be prejudicial to them, and that such amendment was after the expiry of the limitation period.

**Held,** allowing the application:

(1) Order 20 of the Rules of the High Court 1980 gives the court a discretion to allow leave to amend pleadings which must of course be exercised judicially. The power to grant the amendment after the expiry of the limitation period in the circumstances of this case when the amendment would not in effect turn the suit from one character into a suit of another and inconsistent character by merely adding the name of the plaintiff to include Sheikh Khaled bin Jassem bin Mohammad Jassem Al-Thani (see para 6).

(2) Such amendment sought was a mere technical or procedural amendment as the parties had had the earlier advantage of the documents to be aware of the actual status of the plaintiff especially from the legal Commercial Licence issued by the relevant authority in Dubai, UAE. There was no element of surprise. Such amendment was bona fide. There was no change of the cause of action as all the facts were the same so were all the

relief sought. There was no prejudice against the defendant who knew of such fact months before the trial from the available documents (see para 3).

(3) The decision to allow or disallow this amendment did not bar the defendant from proceeding with their said appeal to the Court of Appeal simply because the decision of the Court of Appeal was binding on this court and if the defendant was able to succeed in that appeal, the decision of the Court of Appeal would certainly override the decision of this court even if the amendment was allowed (see para 4).

(4) Grave injustice would be caused to the plaintiff if it was disallowed as the plaintiff could not withdraw the suit with liberty to file afresh with the limitation period having set in and to proceed with the trial without the amendment would be a futile exercise and a waste of judicial time when the rightful claimant is not named as the plaintiff. The court could not allow injustice to supersede any technical error (see para 7).

**[Bahasa Malaysia summary**

Plaintif secara lisan memohon untuk meminda nama plaintif di dalam tajuk guaman daripada 'Petroserv General Trading Establishment' kepada 'Sheikh Khaled Bin Jassem Bin Mohammad E Jassem Al-Thani Berniaga Sebagai Petroserv General Trading Establishment' dan untuk memadamkan perkataan-perkataan 'sebuah syarikat yang diperbadankan di Doha, Qatar' dan menggantikannya dengan 'seorang individu yang berniaga di bawah nama Petroserv General Trading Establishment' di dalam penyata tuntutan. Pemindaan adalah perlu kerana sebuah firma tidak dapat menyaman atas namanya sendiri walaupun ia mungkin disaman atas nama sedemikian. Alasan utama bantahan daripada defendan adalah bahawa pemindaan tersebut, jika dibenarkan, akan menjadikan rayuan mereka terhadap pemohon A 14A mereka yang ditolak oleh mahkamah, tidak berguna atau mensia-sia rayuan mereka berdasarkan pliding-pliding tersebut. Defendan berhujah bahawa pemindaan tersebut akan memprejudiskan mereka, dan pemindaan sedemikian adalah selepas tamat tempoh had masa.

**Diputuskan**, membenarkan rayuan:

(1) Aturan 20 Kaedah-Kaedah Mahkamah Tinggi 1980 memberikan mahkamah budi bicara untuk membenarkan izin untuk meminda pliding-pliding yang mesti dilaksanakan secara kehakiman. Kuasa untuk memberikan pemindaan selepas tamat tempoh had masa dalam keadaan kes ini apabila pemindaan tidak akan pada hakikatnya menukarkan guaman tersebut daripada satu watak kepada guaman yang lain dan watak yang tidak konsisten dengan hanya menambahkan nama plaintif untuk memasukkan Sheikh Khaled bin Jassem bin Mohammad Jassem Al-Thani (lihat perenggan 6).

A (2) Pemindaan sedemikian dipohon adalah hanya pemindaan teknikal atau prosedur memandangkan pihak-pihak telah mempunyai kelebihan terdahulu terhadap dokumen-dokumen untuk menyedari mengenai status sebenar plaintif terutamanya daripada Lesen Perdagangan sah yang dikeluarkan oleh pihak berkuasa relevan di Dubai, UAE. Tidak terdapat B unsur mengejut. Pemindaan sedemikian adalah bona fide. Tidak terdapat penukaran kausa tindakan memandangkan kesemua fakta adalah sama begitu juga dengan relief yang dipohon. Tidak terdapat prejudis terhadap defendan yang mengetahui fakta sedemikian beberapa bulan sebelum perbicaraan daripada dokumen-dokumen yang sedia ada (lihat C perenggan 3).

(3) Keputusan untuk membenarkan atau tidak membenarkan pemindaan ini tidak menghalang defendan daripada meneruskan dengan rayuan mereka kepada Mahkamah Rayuan ini adalah kerana keputusan D Mahkamah Rayuan mengikat ke atas mahkamah ini dan jika defendan berjaya dalam rayuan tersebut, keputusan Mahkamah Rayuan semestinya akan mengatasi keputusan mahkamah ini walaupun pemindaan tersebut dibenarkan (lihat perenggan 4).

E (4) Ketidakadilan serius akan dialami oleh plaintif jika ia tidak dibenarkan memandangkan plaintif tidak dapat menarik balik guaman tersebut dengan bebas untuk memfailkan permohonan baru dengan tempoh had masa telah ditetapkan dan untuk meneruskan dengan perbicaraan tanpa pemindaan akan menjadi usaha yang sia-sia dan membazirkan masa kehakiman apabila penuntut yang berhak tidak dinamakan sebagai F plaintif. Mahkamah tidak boleh membenarkan ketidakadilan untuk menggantikan apa-apa kesilapan teknikal (lihat perenggan 7).]

**Cases referred to**

G *Dato' Tan Heng Chew v Tan Kim Hor & Ors* [2008] 7 MLJ 184; [2008] 7 CLJ 776, HC (refd)

*Kam Hoy Trading v Kam Fatt Tin Mine* [1963] MLJ 248, CA (refd)

*Wee Tiang Kheng & Ors v Ngu Nii Soon & Ors* [1989] 1 MLJ 252, HC (refd)

H *Yamaha Motor Co Ltd v Yamaha (Malaysia) Sdn Bhd & Ors* [1983] 1 MLJ 213; [1983] CLJ (Rep) 428, FC (folld)

**Legislation referred to**

Rules of the High Court 1980 O 14A, O 20

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*Simon Hue Fook Chuan (V Vanaranei a/p Vadiveloo with him) (Simon Hue & Associates) for the plaintiff.*

*Karen Lim (Shareen Abd Manan with her) (Presgrave & Matthews) for the defendant.*

**Chew Soo Ho JC:**

DECISION (ORAL APPLICATION TO AMEND)

THE ORAL APPLICATION

**[1]** This appeal arose from an oral application by the plaintiff to amend the title and para 1 of the statement of claim in the course of the trial on 14 March 2012 during the examination-in-chief of the first and sole witness for the plaintiff. The amendment is on the name of the plaintiff in the title of the suit from 'Petroserv General Trading Establishment' to 'Sheikh Khaled Bin Jassem Bin Mohammad Jassem Al-Thani Berniaga Sebagai Petroserv General Trading Establishment' and in para 1 of the statement of claim by deleting the words 'sebuah syarikat yang diperbadankan di Doha, Qatar' and substituting it with 'seorang individu yang berniaga di bawah nama Petroserv General Trading Establishment'. This amendment is necessary as a firm cannot sued in its own name although it may be sued in such name. It must therefore be sued in the name of the sole proprietor of the firm; see *Wee Tiang Kheng & Ors v Ngu Nii Soon & Ors* [1989] 1 MLJ 252. The main ground of objection from the defendant is that the amendment, if allowed, will render their appeal against their O 14A application which had been dismissed by the court, nugatory or defeat their appeal based on the pleadings. In brief, the defendant is altering that the amendment is prejudicial to them. It was also contended that such amendment is after the expiry of the limitation period.

FINDINGS OF THE COURT

**[2]** Order 20 of the Rules of the High Court 1980 ('RHC') gives the court a discretion to allow leave to amend pleadings which must of course be exercised judicially (see *Kam Hoy Trading v Kam Fatt Tin Mine* [1963] MLJ 248): per Mohd Azmi FCJ in *Yamaha Motor Co Ltd v Yamaha (Malaysia) Sdn Bhd & Ors* [1983] 1 MLJ 213; [1983] CLJ (Rep) 428 where the Federal Court laid down the cardinal principles of law pertaining to amendment of pleadings as follows:

> Three basic questions should be considered to determine whether injustice would or would not result:
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> (1) whether the application is bona fide;
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> (2) whether prejudice caused to the other side can be compensated by costs; and
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> (3) whether the amendments would not in effect turn the suit from one character into a suit of another and inconsistent character.

**[3]** From the documentary evidence before the court as contained in the common bundle of documents marked as bundle C, documents such as the Commercial Licence No 222335, the Merchant's Register Certificate in Commercial Registry, both were issued by the Department of Economic Development Government of Dubai, United Arab Emirates in respect of the trade name of Petroserv General Trading Est (bundle C pp 1–6) and the Commercial Licence No 243959 (bundle C pp 9–11) in respect of Petroserv General Trading Est (Br) issued by the same authority, the licence owner is categorically stated as 'Sheikh Khaled Bin Jassem Bin Mohammad Jassem Al-Thani' and 'Legal Type' of the two trade names 'Petroserv General Trading Est' and 'Petroserv General Trading Est (Br)', its branch, are clearly stated as 'Individual Establishment'. In addition, in the power of attorney dated 26 September 2011 enclosed in the same common bundle of documents ie bundle C at pp 15–17 where Sheikh Khaled was the donor and Mr John Frederick Keen was the donee, it was vividly stated that Petroserv General Trading Est and Petroserv General Trading Est (Branch) are his (Sheikh Khaled's) companies when he said explicitly 'my company Petroserv General Trading Est' and 'my Branch company, Petroserv General Trading Est (Branch)'. This bundle C had been filed officially in court on 19 December 2011 vide its praecipe date which means that the latest by this date of 19 December 2011, the clear fact that both Petroserv General Trading Est which was cited as the name of the plaintiff initially and Petroserv Generally Trading Est (Br) were known to both parties that they belonged to the licence holder named Sheikh Khaled bin Jassem bin Muhammad Jassem Al-Thani, an individual, who should rightfully be named as the plaintiff. Since this is a known fact well before the trial which commenced only on 14 February 2012, the amendment sought on 14 March 2012 scheduled for the continued hearing of this suit, to this court, is no surprise to the defendant. I agree with the submission by the plaintiff that such amendment sought was a mere technical or procedural amendment as the parties had had the earlier advantage of the documents to be aware of the actual status of the plaintiff especially from the legal commercial licence issued by the relevant authority in Dubai, UAE. There is no element of surprise. Thus, this court holds that such amendment is bona fide. Since the amendment was merely adding the name of Sheikh Khaled bin Jassem bin Mohammad Jassem Al-Thani trading as Petroserv General Trading Establishment, there is no change of the cause of action as all the facts are the same so are all the relief sought. I also do not find that there is prejudice against the defendant who knew of such fact months before the trial from the available documents available in the said bundle C, inter alia. There could probably be argued that such application was asked for only during trial. I am of the view that that itself may not be prejudicial when the relevant fact upon which the plaintiff had relied on to apply for amendment was available and known to all parties well before the commencement of the trial bearing in mind that party is permitted to amend the pleadings at any stage of the proceedings

with the leave of the court. If it is contended that the delay had caused prejudice to the defendant, I am of the view that this can certainly be met by an order for costs.

**[4]** The defendant's main argument is that this amendment, if allowed would render their appeal against the dismissal of their O 14A of the Rules of the High Court 1980 application to the Court of Appeal. I disagree for the simple reason that the decision to allow or disallow this amendment does not bar the defendant from proceeding with their said appeal to the Court of Appeal simply because the decision of the Court of Appeal is binding on this court and if the defendant is able to succeed in that appeal, the decision of the Court of Appeal will certainly override the decision of this court even if the amendment is allowed. In that sense, when the defendant's appeal process is not in whatever way being curtailed by the decision relating to this amendment of this court and defendant can nevertheless proceed as usual to ventilate their appeal, I find that this amendment does not prejudice the defendant as contended.

**[5]** On the further contention by the defendant that the amendment, if allowed, would be granted after expiry of the limitation period of the suit, in this respect, learned counsel for the plaintiff had cited the case of *Dato' Tan Heng Chew v Tan Kim Hor & Ors* [2008] 7 MLJ 184; [2008] 7 CLJ 776 where His Lordship Abdul Malik Ishak J (now JCA) has held, inter alia, that:

> Held:
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> (4) The court has the power under the rule to grant an amendment after the expiry of the limitation period notwithstanding the fact that the effect of such an amendment will be to add or substitute a new cause of action subject always to the very important caveat, namely, that the new cause of action must arise out of the same or substantially the same facts as the cause of action in respect of which relief had already been claimed.

**[6]** In our case, there is no change of the cause of action with all the facts and all remedies remaining the same as a consequence of this amendment. I agree that this court has the power to grant the amendment after the expiry of the limitation period in the circumstances of this case when the amendment would not in effect turn the suit from one character into a suit of another and inconsistent character by merely adding the name of the plaintiff to include Sheikh Khaled bin Jassem bin Mohammad Jassem Al-Thani.

**[7]** Having considered the application and all facts advanced including all submissions by both parties, I hold that this application has complied with the requirements as enunciated by the Federal Court in *Yamaha Motor*'s case that such application ought to be allowed by this court in line with the justice of the

A case. I say so that justice of the case demands that this amendment be allowed because grave injustice will be caused to the plaintiff if it is disallowed as the plaintiff cannot withdraw the suit with liberty to file afresh with the limitation period having set in and to proceed with the trial without the amendment would be a futile exercise and a waste of judicial time when the rightful B claimant is not named as the plaintiff. This court cannot allow injustice to supercede any technical error.

**[8]** For the above reasons, the aforesaid amendments as applied for by the plaintiff are allowed and the continuation of the trial was proceeded on.

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*Application allowed.*

Reported by Afiq Mohamad Noor

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